



Via Fax and Email

July 30, 2013

Attn: FOIA Officers
U.S. EPA Region 10, FOIA Officer
1200 Sixth Ave, Suite 900
Seattle, WA 98101
Fax: (206) 553-0501
Phone: (206) 553-8665
Email: r10foia@epa.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer(s):

On behalf of the Center for Biological Diversity (the “Center”), we write to ask the U.S. Environmental Protection Agency (“EPA”) for documents concerning the agency’s consultation with the Makah Tribe about ocean acidification. The Center is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process.

Please treat this letter as a formal request for information under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

The documents sought by the present request (hereinafter “documents”) include any written, recorded, or graphic material – whether or not prepared by EPA – that is in the agency’s possession, custody, or control, including forms, maps, memoranda, reports, surveys, models, studies, letters, telegrams, facsimiles, electronic correspondence (including e-mail in any form), “Power Point” presentations, and notes, minutes, and transcripts of conferences, meetings, and telephone or other communications. Specifically, we request:

All documents and communications within EPA Region 10, between Region 10 and EPA headquarters, between EPA and other agencies, and between EPA and the Makah Tribe that relate to EPA’s consultation with the Makah Tribe about ocean acidification and section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d).

REQUEST FOR FEE WAIVER

The Center requests that you waive all fees in connection with this matter. As shown below, the Center meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee waiver regulations at 40 C.F.R. § 2.107. In particular, the Center has demonstrated that the disclosure of this information will significantly contribute to public understanding of the operations or activities of the government.

In considering whether the Center meets the fee-waiver criteria, it is imperative that the EPA remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest groups such as the Center access to government documents without the payment of fees. As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." Id.

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As a District of Columbia Circuit Court has stated, this waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. Better Gov't Ass'n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added). The Center has previously prevailed in litigation in which the government questioned the Center's entitlement to FOIA fee waivers. See, e.g., Center for Biological Diversity v. OMB, 546 F. Supp. 2d 722 (N.D. Cal. 2008).

I. The subject of the requested records concerns "the operations or activities of the government."

The subject matter of this request relates to the implementation of environmental laws and regulations, and in particular to EPA's oversight and implementation of Section 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d)(2). It is clear that such decisions, as well as EPA's overall implementation and execution of environmental laws, are

specific and identifiable activities of an executive branch agency of the government. See Judicial Watch, 326 F.3d at 1313 (“‘[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted). The EPA’s consultation with the Makah Tribe about ocean acidification and the Clean Water Act is an identifiable task of EPA, there is no question that the decisions, standards, and methods adopted by EPA in performing this task are a U.S. government operation. Thus this FOIA request plainly concerns the operations or activities of the government.

II. The disclosure is of the requested information is likely to contribute to an understanding of government operations or activities.

There is no question that the documents requested will contribute to an understanding of federal government operations. The documents are new and are not in the public domain. They will undoubtedly provide meaningful understanding of EPA’s compliance with and implementation of federal statutes including the Clean Water Act, because they will reveal facts pertaining to the decisions, standards, and methods at issue. This is certain to shed light on the EPA’s consultation process and compliance with applicable law.

The requested documents will provide important information regarding EPA’s decision-making in regard to protecting environmental quality and human health from the impacts of ocean acidification. Such knowledge will allow better understanding of government operations, in particular, what EPA knows, what EPA is or is not doing, what EPA could be doing, and what reasons EPA might have for taking or not taking certain actions in regard to the environmental and human health impacts that it oversees. The requested documents will provide important information regarding EPA’s exercise of its authority under the Clean Water Act to regulate ocean acidification. Thus, production of the requested documents is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents potentially provide new information about Oregon and Washington’s water. See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also Community Legal Services v. HUD, 405 F.Supp.2d 553 (D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”)

III. The disclosure of the requested information will contribute to “public understanding.”

The information requested will contribute to public understanding of how EPA is discharging its duties under the Clean Water Act to protect water quality and public health and welfare nationally. The information requested will also help provide the Center, Center members, and the public that the Center disseminates information to with insight into the EPA’s implementation of the Clean Water Act with regards to ocean acidification and impaired waters. The public is well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See Judicial Watch, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”). The requested documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute significantly to a better public understanding of the operations of the government when consulting with tribes about their implementation of the Clean Water Act.

Public understanding of the new information will be achieved because the Center intends to use the new information that it receives to educate the public by informing the public about the EPA’s regulation of ocean acidification in Washington, how EPA is consulting with tribes about ocean acidification and Clean Water Act implementation, and also informing the public about what the EPA could be doing in light of the known information.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” Judicial Watch, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. Id.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center’s fee-waivers, agencies have recognized that the Center possesses the expertise to explain the requested information to the public and the Center possesses the ability to disseminate the requested information to the general public (e.g. the Center has several staff biologists and staff attorneys who have the ability to assess and digest the requested information, and the Center has the capacity

to publish reports regarding that information). The Center's informational publications supply information not only to its membership, but also to the memberships of most other conservation organizations, locally as well as nationally. In addition, our informational publications are disseminated to the media and are available on our website to the general public.

The documents requested in this FOIA request will be used to assess EPA's current knowledge and management of ocean acidification off the coast of Washington and advice to the Makah Tribe in regards to ocean acidification and implementation of section 303d of the Clean Water Act. The documents will also be used to determine whether and how the EPA is complying with and implementing its obligations in regard to the Clean Water Act.

Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize the reasons for the action and the underlying actions of EPA and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA responsibilities. The Center has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one. The Center intends to use the documents requested in this request in a similar manner. Information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which are sent to over 300,000 people approximately once a week, and our website, which receives approximately 390,000 views each month. In addition, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. Information concerning the regulation of waters affected by ocean acidification will likely be disseminated through all of these means. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

IV. Obtaining the information is of no commercial interest to the Center.

Access to government documents and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit, 501(c)(3) organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

Attn. FOIA Officers, USEPA Region 10

January 7, 2013

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I hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee waiver. Please call me at (415) 632-5308 if you have any questions concerning the scope of this request or the nature of the documents requested. Please send all materials to the address below within the timeline required by FOIA. Thank you.

Sincerely,

/s/ Miyoko Sakashita

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